Tahir, Roslan and Tasariff Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri and other appeals

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NOS WA-14–16–06 OF 2022, WA-14–17–06 OF 2022 AND WA-14–18–06 OF 2022
AMARJEET SINGH J
5 JULY 2023

Revenue Law — Real property gains tax — Assessment — Rate of tax applicable pursuant to Part II of Schedule 5 of Real Property Gains Tax Act 1976 ('Act 169') — Appellants entered into sale and purchase agreements of lands — Sale and purchase agreements were conditional contracts — Whether imposition of rate of tax at 10% pursuant to amendment to Part II of Schedule 5 of Act 169 which came into effect on 1 January 2019 had impaired existing right of appellants on sale and purchase agreements entered into prior to amendment — Finance Act 2018 ss 69 & 70 — Real Property Gains Tax Act 1976 Schedule 2, para 16 & Schedule 5, Part II

Statutory Interpretation — Retrospective operation — Taxing statute — Finance Act 2018 ('Act 812') amended Part II of Schedule 5 of Real Property Gains Tax Act 1976 ('Act 169') by increasing rate of tax from 5% to 10% with effect from 1 January 2019 — Director General of Land Revenue imposed rate of tax at 10% for disposal of appellants' lands — Whether there was retrospective application of s 70 of Act 812 — Whether imposition of tax at rate of 10% impaired appellants' vested right and in breach of s 30(1)(b) of Interpretation Acts 1948 and 1967 — Finance Act 2018 ss 69 & 70 — Interpretation Acts 1948 and 1967 s 30(1)(b) — Real Property Gains Tax Act 1976 Schedule 2, para 16 & Schedule 5, Part II

The appellants had entered into sale and purchase agreements with United Plantations Bhd ('the purchaser') for the sale of several agriculture lands located in Daerah Hilir Perak ('the lands') which were owned by the appellants. All the sale and purchase agreements were conditional contracts. The sale was subject to real property gains tax under the Real Property Gains Tax Act 1976 ('Act 169'). As at 31 December 2018, Part II of Schedule 5 of Act 169 provided that in a case where the disposer of land was a company, the rate for disposal in the sixth year after the date of acquisition was 5%. With effect from 1 January 2019, the Finance Act 2018 ('Act 812') amended Part II of Schedule 5 of Act 169 by increasing the rate of tax for disposal in the sixth year after the date of acquisition to 10%. Pursuant to this amendment and considering that the last of the conditions under the sales and purchase agreements was fulfilled on

29 May 2019, the Director General of Inland Revenue ('the DGIR') had imposed the real property gains tax at the rate of 10% in relation to the disposal of the lands. On appeal, the Special Commissioner of Income Tax ('the SCIT') agreed with the DGIR's assessment, hence, the present appeals. The question of law to be determined by the court was whether the imposition of the rate of tax at 10% pursuant to the amendment to Part II of Schedule 5 of Act 169 which came into effect on 1 January 2019 had impaired the existing right of the appellants on sale and purchase agreements entered into prior to the amendment. The appellants submitted that: (a) the correct rate was 5% since the sale and purchase agreements were signed on 21 September 2018; and (b) the imposition of tax at the rate of 10% impaired the vested right of the appellants and was in breach of s 30(1)(b) of the Interpretation Acts 1948 and 1967.

Held, dismissing the appeals:

(1) In view of para 16 Schedule 2 of Act 169 and given the fact that the sale and purchase agreements were conditional contracts, the date of disposal was the date when the last of the conditions was satisfied. The last of the conditions was, for each sale and purchase agreement, fulfilled on 29 May 2019. Therefore, 29 May 2019 was the date of disposal for the purpose of determining the chargeable gain from the sale of the said lands. The chargeable gain arose after the date the amendment had become operative ie, on 1 January 2019 as per s 69 of Act 812, as such, the rate in force was 10%. The SCIT had therefore applied the correct rate (see paras 22 & 25).

(2) Section 69 of Act 812 mandated that the liability to real property gains tax commenced from 1 January 2019 at the rate provided in the amended Part II Schedule 5 of Act 169. The provision was not enacted to be retrospective in application but was prospective in nature. It did not operate retrospectively to impair a vested right of the appellants or to impose a new liability. The right to pay or more appropriately the liability to pay tax had not even arisen at the time the sale and purchase agreements were executed. The liability to pay real property gains tax only arose when the last of the conditions was satisfied as provided under the second exception to para 16 Schedule 2. The common law rule of construction as provided in the case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 was therefore not relevant to the facts of the present case. There was therefore no retrospective application of s 70 of Act 812. Further, since the amendment made in the present case was not enacted retrospectively, there was no issue of enacting any clear words to remove an existing right (see paras 27 & 30–32).

A **[Bahasa Malaysia summary**

Perayu-perayu telah memeterai perjanjian jual beli dengan United Plantations Bhd ('pembeli') untuk penjualan beberapa tanah pertanian yang terletak di Daerah Hilir Perak ('tanah-tanah tersebut') yang dimiliki oleh perayu-perayu. Semua perjanjian jual beli tersebut adalah kontrak bersyarat. Penjualan tersebut tertakluk kepada cukai keuntungan harta tanah di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('Akta 169'). Setakat 31 Disember 2018, Bahagian II Jadual 5 Akta 169 memperuntukkan bahawa dalam kes di mana pelupus tanah adalah sebuah syarikat, kadar untuk pelupusan dalam tahun keenam selepas tarikh pemerolehan ialah 5%. Berkuat kuasa 1 Januari 2019, Akta Kewangan 2018 ('Akta 812') meminda Bahagian II Jadual 5 Akta 169 dengan menaikkan kadar cukai untuk pelupusan dalam tahun keenam selepas tarikh pemerolehan kepada 10%. Selaras dengan pindaan ini dan mengambil kira bahawa syarat terakhir di bawah perjanjian-perjanjian jual beli tersebut telah dipenuhi pada 29 Mei 2019, Ketua Pengarah Hasil Dalam Negeri ('KPHDN') telah mengenakan cukai keuntungan harta tanah pada kadar 10% berhubung dengan pelupusan tanah-tanah tersebut. Semasa rayuan, Pesuruhjaya Khas Cukai Pendapatan ('PKCP') bersetuju dengan penilaian KPHDN, oleh itu, rayuan semasa. Persoalan undang-undang yang perlu ditentukan oleh mahkamah ialah sama ada pengenaan kadar cukai pada 10% menurut pindaan Bahagian II Jadual 5 Akta 169 yang berkuat kuasa pada 1 Januari 2019 telah menjejaskan hak sedia ada bagi perayu-perayu atas perjanjian-perjanjian jual beli yang dibuat sebelum pindaan tersebut. Perayu-perayu berhujah bahawa: (a) kadar yang betul ialah 5% memandangkan perjanjian-perjanjian jual beli tersebut ditandatangani pada 21 September 2018; dan (b) pengenaan cukai pada kadar 10% menjejaskan hak kukuh perayu-perayu dan melanggar s 30(1)(b) Akta Tafsiran 1948 dan 1967.

Diputuskan, menolak rayuan-rayuan:

(1) Mengambil kira perenggan 16 Jadual 2 Akta 169 dan fakta bahawa perjanjian-perjanjian jual beli tersebut adalah kontrak bersyarat, tarikh pelupusan adalah tarikh apabila syarat terakhir dipenuhi. Syarat terakhir bagi setiap perjanjian jual beli tersebut telah dipenuhi pada 29 Mei 2019. Oleh itu, 29 Mei 2019 adalah tarikh pelupusan bagi tujuan menentukan keuntungan bercukai daripada penjualan tanah-tanah tersebut. Keuntungan bercukai timbul selepas tarikh pindaan berkuat kuasa iaitu pada 1 Januari 2019 mengikut s 69 Akta 812, oleh itu, kadar yang terpakai ialah 10%. Oleh itu, PKCP telah menggunakan kadar yang betul (lihat perenggan 22 & 25).

(2) Seksyen 69 Akta 812 memberi mandat bahawa liabiliti kepada cukai keuntungan harta tanah bermula dari 1 Januari 2019 pada kadar yang diperuntukkan dalam Bahagian II Jadual 5 Akta 169 yang dipinda.

Peruntukan tersebut tidak digubal untuk terpakai secara retrospektif tetapi bersifat prospektif. Ia tidak beroperasi secara retrospektif untuk menjejaskan hak kukuh perayu-perayu atau untuk mengenakan liabiliti baharu. Hak untuk membayar atau lebih tepat lagi liabiliti untuk membayar cukai belum timbul pada masa perjanjian-perjanjian jual beli tersebut dimeterai. Liabiliti untuk membayar cukai keuntungan harta tanah hanya timbul apabila syarat terakhir yang berkaitan dipenuhi seperti yang diperuntukkan di bawah pengecualian kedua kepada perenggan 16 Jadual 2. Oleh itu, peraturan pentafsiran undang-undang biasa seperti yang diperuntukkan dalam kes *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 adalah tidak relevan dengan fakta kes semasa. Oleh yang demikian, tidak terdapat penggunaan retrospektif s 70 Akta 812. Selanjutnya, oleh kerana pindaan yang dibuat dalam kes ini tidak digubal secara retrospektif, tidak ada isu untuk menggubal apa-apa perkataan yang jelas untuk menghapuskan hak sedia ada (lihat perenggan 27 & 30–32).]

Cases referred to

Commissioner of Income Tax, UP v Shah Sadiq and Sons 1987 AIR 1217, SC (distd)

Geetanjali Trading & Investment Ltd v Income Tax Officer (ITA No 5428/MUM/2007 & 1737/Mum/2009) (distd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (distd)

Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (refd)

Legislation referred to

Co-operative Societies Ordinance 1949 (repealed by Societies Act 1966)
Financial Act 2018 ss 69, 70, 70(b)
Income Tax Act 1967 Schedule 9, para 33
Income Tax Ordinance 1947 (repealed by Income Tax Act 1967) s 13(1)(f)(ii)
Interpretation Acts 1948 and 1967 s 30(1), (1)(b)
National Land Code s 433B
Real Property Gains Tax Act 1976 ss 3, 3(2), 4, 7, 7(1), (3), 18, Schedule 2, paras 15, 16, Schedule 5, Part II

Vijey Krishnan (with William Wong) (Raja, Darryl & Loh) for the appellant.
Noor Faezah bt Zainodin (with Munirah bt Abd Wahid) (Revenue Attorney, Inland Revenue Board) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] This judgment concerns three appeals that emanated from a decision of the Special Commissioners of Income Tax ('the SCIT') delivered on 20 April 2022. The appeals are as follows:

(a) Appeal No WA-14–16–06 of 2022 by Tahir, Roslan and Tasariff Sdn Bhd ('Tahir');

(b) Appeal No WA-14–17–06 of 2022 by Sykt Kaum Melayu Hilir Perak Sdn Bhd ('Sykt Kaum Melayu'); and

(c) Appeal No WA-14–18–06 of 2022 by Pinehill Plantations (Malaysia) Sdn Bhd ('Pinehill').

[2] In this judgment, the three appeals are referred to as 'the appeals' unless otherwise stated. There was only one identical issue in the appeals. The issue concerned the appropriate rate of tax to be imposed on the appellants for the disposal of land under Part II of Schedule 5 of the Real Property Gains Tax Act 1976 ('the RPGTA'). For this reason, parties agreed to have the appeals heard together.

[3] The appellants had appealed to the SCIT against the assessments made against each appellant ('the assessments') which was for the year of assessment 2019 ('YA 2019') as a result of the sale of certain lands owned by the appellants. The SCIT upheld the DGIR's assessment agreeing with the rate of tax imposed. The appellants appealed to this court against the decision of the SCIT. On 5 April 2023, I dismissed the appeals. The reasons for my decision are as follows.

BACKGROUND

[4] The following facts were agreed by the parties. The appellants had on 21 September 2018 entered into sale and purchase agreements with United Plantations Bhd ('the purchaser') for agriculture lands cultivated with palm oil trees held by them respectively. There were 7 lots of land: (i) PN 286020 Lot 7362, Mukim Changkat Jong; (ii) PN 290568 Lot 7258, Mukim Changkat Jong; (iii) PN 290563 Lot 7280, Mukim Changkat Jong; (iv) PN 290566 Lot 7281, Mukim Changkat Jong; (v) PN 309287 Lot 11501, Mukim Durian Sebatang; (vi) PN 349423 Lot 5936, Mukim Durian Sebatang; and (vii) PN 308136 Lot 5936, Mukim Changkat Jong. All these lands were in Daerah Hilir Perak, in the State of Perak.

[5] The completion of the sale and purchase agreements were subject to condition precedents which were to be fulfilled within a period of six months from the date of the said agreements with an automatic extension of a further two months. All the sale and purchase agreements were conditional contracts. The condition precedents and their dates of fulfillment are as follows:

(a) approval of the Economic Planning Unit ('EPU') which approval was obtained on 19 December 2018;

(b) approval of the Perak State Authority pursuant to s 433B of the National Land Code ('the NLC') upon terms and conditions acceptable to the purchaser, which approval was obtained on 7 May 2019 and which approval had several conditions which required the purchaser's agreement;

(c) written consent of the Perak State Authority pursuant to the restriction-in-interest contained in the title deeds, which consent was obtained on 9 May 2019; and

(d) the written consent of the Estate Land Board, which was consent was obtained on 29 May 2019.

[6] The appellants and the purchaser then on 10 June 2019 signed supplemental agreements to modify and vary certain provision of the sale and purchase agreements. On the same day, the purchaser accepted the conditions set out in the approval of the Perak State Authority pursuant to s 433B of the NLC. Thereafter, on 12 June 2019 the memorandums of transfer ie Form 14A were executed by the appellants in favour of the purchaser.

[7] The sale was subject to real property gains tax under the RPGTA. As at 31 December 2018, Part II of Schedule 5 of the RPGTA provided that in a case where the disposer of land is a company, the rate for disposal in the sixth year after the date of acquisition was 5%. With effect from 1 January 2019, the Finance Act 2018 amended Part II of Schedule 5 of the RPGTA by increasing the rate of tax for disposal in the sixth year after the date of acquisition to 10%.

[8] On 26 July 2019, the appellants' tax agent filed the real property gains tax returns of chargeable asset vide Forms CKHT 1A. The DGIR made the assessments for real property gains tax at the rate of 10% pursuant to the amendment and raised the notices of assessment in Form K ('the impugned assessments'). This was followed by the appellants filing their respective notices of appeal in Form Q against the impugned assessments pursuant to s 18 of the RPGTA.

A THE DECISION OF THE SCIT

[9] The facts before the SCIT were agreed as shown above. The only issue before the SCIT was whether the gains from the disposal of the lands is subject to real property gains tax at the rate of 10% or 5% under Part II, Schedule 5 of the RPGTA.

[10] It was not in dispute before the SCIT that the last approval as required under cl 3.1 of the sale and purchase agreements was obtained on 29 May 2019. This was agreed by the only witness for the appellants, K Selveswaran Kanagaratnam ('SP1') who is the Executive Director of Pinehill Pacific Bhd in his testimony. This date was also stated in their Form CKHT 1A by the respective appellants.

[11] The SCIT, after considering ss 3, 4, 7, paras 15 and 16, Schedule 2 and Part II, Schedule 5 of the RPGTA the SCIT held that the applicable rate of tax provided in Part II, Schedule 5 of the RPGTA with effect from 1 January 2019 was applicable in the case before them. The SCIT disagreed with the submission that the deeming provision as to the date of disposal of an asset under para 15 of Schedule 2 was applicable and stated that the specific provision concerning conditional contracts provided in para 16 of Schedule 2 of the RPGTA prevailed and was applicable. The SCIT found no ambiguity in the provisions or that the provisions gave rise to more than one interpretation and said that the ordinary meaning was clear and must be taken and given effect.

[12] The SCIT also found the common law rule of construction set out in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 that prima facie a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used relied by the appellants was irrelevant to the facts of the instant case. The SCIT was also of the view that sub-ss 7(1) and 7(3), and Schedule 2 of the RPGTA must be read together with sub-s 3(2) and Part II, Schedule 5 of the RPGTA as the provisions are interlinked with each other. This view rejected the appellants' proposition to the effect that the provisions of the Schedule 2 cannot override ss 2 and 3 of the RPGTA.

[13] The SCIT concluded by setting out its deciding order which can be summarised as follows: (i) the appellants failed to discharge the onus of proving that the impugned assessments were erroneously made; (ii) the sale and purchase agreements are conditional contracts by virtue of its terms and conditions, in particular, cl 3.1 in the said agreements; (iii) pursuant to para 16 Schedule 2 of the RPGTA the date of disposal of the said lands was on 29 May 2019 ie the date the last condition in the said sale and purchase agreements was

satisfied; (iv) the chargeable gains from the disposal of the said lands is subject to tax at the rate of 10%; (v) the issue of retrospective implementation does not arise on the facts of the instant case; and (vi) the appeal is dismissed and the notices regarding the impugned assessments are upheld.

THE QUESTION OF LAW

[14] The appellants have satisfied the entitlement to appeal against the decision order of the SCIT on a question of law.

[15] The question of law is whether the imposition of the rate of tax at 10% pursuant to the amendment to Part II of Schedule 5 of the RPGTA which came into effect on 1 January 2019 has impaired the existing right of the appellants on sale and purchase agreements entered into prior to the amendment.

DECISION OF THE COURT

[16] First, the relevant provisions of the RPGTA. Subsection 3(1) provides that real property gains tax shall be charged as provided in in its provisions in respect of chargeable gain accruing on the disposal of any real property, which is given the term 'chargeable asset', under the RPGTA. Subsection 3(2) state that 'subject to' the RPGTA *the tax shall be charged on chargeable gains in respect of each category of disposal of chargeable assets specified in Schedule 5*.

[17] Section 4 of the RPGTA empowers the charging of tax at a specified rate for the categories of disposal specified in Schedule 5 as follows:

> (1) The *tax shall be charged at the appropriate rate specified in Schedule 5 in respect of each category of disposal stated therein.*
>
> (2) The Minister, where he is satisfied that it is the intention of the Government to promote the introduction of a Bill to vary in any particular way the rate of tax, may by statutory order declare the rate to be varied in that way, and, where he does so, then, subject to subsections (3) and (4), *this Act shall have effect as if the rate as so varied had come into force at the beginning of the first year of assessment for which the Bill seeks to vary that rate.* (Emphasis added.)

[18] The relevant part of Schedule 5 is Part II which is at the centre of this appeal. The part provides that where a chargeable asset is disposed in the fifth year after the date of acquisition or thereafter, the tax rate is 10%. Prior to this date, the rate of tax was 5%. The amendment from 5% to 10% was made *vide* para (b), s 70 of the Finance Act 2018. Section 69 of the said Act provided that the amendment comes into operation on 1 January 2019.

[19] In this regard 'chargeable gains' and 'allowable losses' are set out in s 7 as

follows:

(1) *Where a chargeable asset is disposed of, then —*

(a) *if the disposal price exceeds the acquisition price, there is a chargeable gain*;

(b) if the disposal price is less than the acquisition price, there is an allowable loss; and

(c) if the disposal price is equal to the acquisition price, there is neither a chargeable gain nor an allowable loss.

(2) In this section, an allowable loss means a loss suffered on the disposal of a chargeable asset which, if it had been a gain, would have been chargeable with the tax.

(3) *Subsection (1) shall be subject in its operation to Schedule 2, which shall have effect for computing acquisition and disposal prices and otherwise as provided therein.* (Emphasis added.)

[20] The relevant provision in Schedule 2 is para 15(1)(a) which provides:

(1) *Except where this Schedule provides otherwise,* a disposal of an asset shall be deemed to take place —

(a) where there is a written agreement for the disposal of the asset, on the date of such agreement;

[21] In Schedule 2 there is a provision that provides otherwise. It is para 16 which specifically provides for conditional contracts. This provision is an exception to the general provision provided in para 15(1)(a). Paragraph 16 is in the following words:

Where a contract for the disposal of an asset is conditional and the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless —

(a) the acquisition or disposal requires the approval by the Government or a State Government, the date of disposal shall be the date of such approval; or

(b) *the approval referred to in subparagraph (a) is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied.* (Emphasis added.)

[22] Thus, in view of para 16 Schedule 2 and given the fact that the sale and purchase agreements are conditional contracts, the date of disposal is the date when the last of the conditions was satisfied. The last of the conditions was, for each sale and purchase agreement, fulfilled on 29 May 2019. Therefore, 29 May 2019 is the date of disposal for the purpose of determining the chargeable gain from the sale of the said lands. The chargeable gain arose after

the date the amendment had become operative. The rate in force then was 10%. The SCIT had therefore applied the correct rate. In this circumstance there is no issue of retrospective operation of the applicable rate.

[23] The appellants' argued that the correct rate was 5% since the sale and purchase agreements were signed on 21 September 2018. This argument cannot succeed in view of the clear and plain wordings of para 16 Schedule 2 read with ss 69 and 70(b) of the Finance Act 2018. The chargeable gains arise for conditional contracts depending on the date of disposal as provided in para 16 Schedule 2. Paragraph 16 Schedule 2 provide three different dates for disposal. The first is the general provision where there is a condition and that condition (by the exercise of a right under an option or otherwise) has been satisfied. In this situation, the date of disposal is regarded as taking place at the time the contract is made.

[24] Then are the two exceptions to the general rule. The first exception is where the conditional contract requires the approval of the government or a state government. In this situation, the date of disposal is the date of the said approval being given. The second exception is where the approval of the government or a state government is conditional, the date of disposal is the date when the last of all such conditions is satisfied.

[25] In the instant case, the rate of tax is governed by the exceptions. The date the last condition was satisfied was 29 May 2019. At that time the amendment was already in force and the prevailing rate was 10%. Further, s 69 of the Financial Act 2018 is clear and unambiguous. It states that the amendment would become operational on 1 January 2019. So, for the purposes of the second exception in para 16 Schedule 2, the date of disposal of the chargeable asset is 29 May 2019 and not the date of signing of the sale and purchase agreements. It is only on 29 May 2019 that the tax implications in respect of the RPGTA arose. Therefore, the disposal of chargeable assets under the sale and purchase agreements are subject to the rate of tax at 10% and not 5%, On the undisputed facts, the SCIT did not misdirect itself or commit any error of law. The decision was made according to law.

[26] The appellants next argued that the imposition of tax at the rate of 10% impaired the vested right of the appellants and is in breach of s 30(1)(b) of the Interpretation Acts 1948 and 1967 which state:

> (1) The repeal of a written law in whole or in part shall not —
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> (a) ...;
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> (b) *affect any right,* privilege, obligation *or liability acquired, accrued or incurred under the repealed law*; or
>
> (c) ...

A *and any such* investigation, *legal proceeding* or remedy *may be instituted,* continued or enforced, and any such penalty, forfeiture or punishment may be imposed, *as if the repealing law had not been made.* (Emphasis added.)

B **[27]** Section 69 of the Finance Act 2018 mandated that the liability to real property gains tax commences from 1 January 2019 at the rate provided in the amended Part II Schedule 5 of the RPGTA. The provision is not enacted to be retrospective application but is prospective in nature. The right to pay or more appropriately the liability to pay tax had not even arisen at the time the sale and purchase agreements were executed. The liability to pay real property gains tax C only arose when the last of the conditions was satisfied as provided under the second exception to para 16 Schedule 2. There is therefore no retrospective application of s 70 of the Finance Act 2018.

D **[28]** The appellants then relied on the common law rule of construction set out by the Privy Council in *Yew Bon Tew* which is in the following words:

> Apart from the provisions of the Interpretation Statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is E unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

[29] The principle provides that prima facie a vested right cannot be taken F away or be impaired by the retrospective operation of the amendment and that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. According to this principle, if there is a retrospective amendment it must not impair an existing right unless by clear and unambiguous words.

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[30] It was submitted that the appellants' vested right to pay tax at 5% was impaired. I am unable to agree with this submission. The amendment to Part II of Schedule 5 is not retrospective. It is prospective. It does not operate retrospectively to impair a vested right or imposes a new liability. The liability H to pay tax only arose on 29 May 2019, the date of disposal according to para 16 Schedule 2. The common law principle is therefore not relevant to the facts of the instant case as held by the SCIT given that the tax liability of 5% had not arisen when the amendment to Part II Schedule 5 came into force the appellants had not acquired any right and there was no retrospective operation I of the amendment.

[31] The appellants relied on *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 to support their position. I find the case of no assistance to the appellants and not

relevant to the instant case before me. There the taxpayer was a society registered under the Co-operative Societies Ordinance 1949, and was vide s 13(1)(f)(ii) of the Income Tax Ordinance 1947 exempted from payment of income tax. The Income Tax Act 1967 ('the ITA') repealed the Ordinance but the exemption conferred by the Ordinance was continued by para 33, Schedule 9 of the ITA. In 1980, the Income Tax (Amendment) Act 1980 ('the Amendment Act') removed the exemption and further by s 1(5), the amendment to para 33 of the ITA was made retrospective to the year of assessment 1968. In view of this amendment, the DGIR raised assessments afresh on the taxpayer for the years of assessment 1977–1981. The SCIT in that case discharged the assessments and held that the amendment to para 33 Schedule 9 of the ITA did not have the effect of removing the exemption from tax. On appeal by the DGIR, the High Court reversed the decision and held that the taxpayer no longer enjoyed the exemption by virtue of the amendment. The taxpayer appealed. The Supreme Court reversed the High Court holding as follows: (i) the taxpayer had an acquired right to exemption under the Ordinance when the Act came into force. That acquired right could only be overruled prospectively and not retrospectively; and (ii) although the legislature had made its intention clear in s 1(5) of the Amendment Act that s 16 therein which amended Schedule 9 of the ITA shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment, the amending Act did not expressly provide that Part I of the Interpretation Acts 1948 and 1967 shall not apply. This raised a doubt whether the legislature had intended to impair the existing right of the appellant and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there was a doubt, the ambiguity must be construed in favour of the appellant as the exemption from tax had not been removed by sufficiently clear words to achieve that purpose.

[32] In the instant case, the amendment to Part II of Schedule 5 was not made retrospective. It was prospective in its application. In the *National Land Finance Co-operative Society Ltd* case, not only was the amendment made to operate retrospectively, the Amendment Act further did not expressly provide that the equivalent to s 30(1) of the Interpretation Acts 1948 and 1967 shall not apply. Similarly, the cases of *Geetanjali Trading & Investment Ltd v Income Tax Officer* (ITA No 5428/MUM/2007 & 1737/Mum/2009) and *Commissioner of Income Tax, UP v Shah Sadiq and Sons* 1987 AIR 1217 (SC) are also distinguished on the facts and the application of the said principle. Further, since the amendment made in the instant case is not enacted retrospectively there is no issue of enacting any clear words to remove an existing right. Thus, the submission of ambiguity arising from the manner in which the amendment and it corning into force is misconceived and devoid of merit. Only if the amendment is retrospective in its operation does the need arise for clear words to impair an existing right or liability.

A CONCLUSION

[33] For the above reasons there is no reason for this court to interfere with the deciding order of the SCIT. The appeal is dismissed.

B *Appeals dismissed.*

Reported by Dzulqarnain Ab Fatar

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